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No. 86-910

In the Supreme Court of the United States

OCTOBER TERM, 1986

EXPORTADORA COLOMBIANA DE EMERALDAS CO., LTD. AND JOSE TOMAS VARGAS ORTIZ, PETITIONERS

v.

$630,000 IN UNITED STATES CURRENCY AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners challenge the forfeiture of $630,000 under 21 U.S.C. 881(a)(6) on the ground that the evidence was insufficient to establish probable cause to believe that the currency was related to unlawful narcotics activities.

1. Following an *in rem* forfeiture proceeding conducted before a jury in the Central District of California, the district court ordered petitioners to forfeit $630,000 in United States currency because it was derived from or related to illicit narcotics transactions. The court of appeals affirmed (Pet. App. 1-5).

a. As summarized in the decision of the court of appeals (Pet. App. 2-3), the evidence at trial showed that at approximately 7:00 p.m. on October 18, 1983, two Los Angeles police officers and a Drug Enforcement Administration agent observed Francisco Jose Campos and Ruby Maria Palomino arrive at the Los Angeles International Airport on an Eastern Airlines flight from Miami. The two carried little luggage, and Palomino, who was wearing a blouse tucked into her slacks, appeared to be neither heavy nor pregnant (I Tr. 29, 32-33). The officers

learned from an Eastern Airlines reservations clerk that the two passengers had booked a return flight to Miami for 11:15 p.m. that same evening and that they had told the clerk that they had come to Los Angeles for a funeral (I Tr. 29-30). The officers viewed this explanation with suspicion because funerals typically are not held at night, the two were not dressed appropriately for a funeral, and persons in mourning rarely travel 3,000 miles to stay only a few hours (Pet. App. 3). As the actions and appearance of the two passengers were consistent with that of drug couriers, the officers decided to await their return to the airport.

At approximately 11:00 p.m., Campos and Palomino returned to the airport and prepared to board the Miami-bound flight. Both were dressed quite differently from when they arrived in Los Angeles four hours earlier, and both appeared to have gained a great deal of weight; Palomino, in fact, appeared to be pregnant (I Tr. 36-37, 95). Upon questioning, the two claimed to be married to each other, and Campos stated that Palomino was three months pregnant (I Tr. 38; II Tr. 4-5).

At the officers' request, Campos and Palomino consented to searches of the purse and luggage they were carrying. Campos claimed that he had only $5,000 with him, but the search of his carry-on bag revealed $23,000 in $100 bills (I Tr. 42, 44; II Tr. 7). The two then agreed to accompany the officers to the DEA's airport office and to submit to body searches. These searches disclosed the explanation for their sudden increase in apparent size: Campos was wearing a corset containing $334,000; and Palomino was not pregnant, but was wearing a corset containing $273,000 (I Tr. 47, 75-76; II Tr. 15). The two refused to divulge any information about the origin, ownership, or destination of the money other than to state that the money belonged to "the Company," an entity that neither could identify further (I Tr. 42, 52-53; II Tr. 8). The of-

ficers found no documents or other evidence of where the money had come from; nor did they discover narcotics or narcotics paraphernalia (I Tr. 69-71; II Tr. 20). The officers seized the cash. See Pet. App. 3.

The following day, a drug detecting dog owned by the Los Angeles police was called in to sniff the seized cash for narcotics. The dog gave a positive alert to the cash, indicating that it had been in contact with a controlled substance (II Tr. 83-84, 110-111, 117-118). Moreover, evidence showed that Campos and Palomino were both Colombian nationals and, contrary to their statement to the police, they were not married to one another. Pet. App. 4.

b. Petitioners claimed the seized currency, and a forfeiture proceeding was held under 21 U.S.C. 881(a)(6). The jury rejected petitioners' effort to explain the money as the proceeds of emerald sales. Judgment was entered for the government. On appeal, petitioners argued that the government had failed to meet its preliminary burden to establish probable cause to believe that the seized currency was derived from or related to narcotics activities. In an unpublished opinion, the court of appeals rejected petitioners' argument, holding that the "aggregate of facts," including the large sum of money found on the two couriers and the alert by the drug detecting dog, constituted probable cause (Pet. App. 4).

2. The standards that govern forfeiture proceedings under Section 881(a)(6) are not in dispute. As the court of appeals explained in *United States* v. *$364,960.00 in United States Currency,* 661 F.2d 319, 323 (5th Cir. 1981), "the government must show 'probable cause for belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute;' *i.e.*, the exchange of a controlled substance." Moreover, "the definition of probable cause applicable here is the same as that which applies elsewhere: 'reasonable ground for belief of guilt, supported by less than prima facie

proof but more than mere suspicion' " (*ibid.*). See also *United States* v. *$93,685.51 in United States Currency*, 730 F.2d 571, 572 (9th Cir.), cert. denied, 469 U.S. 831 (1984). Further, probable cause in a forfeiture proceeding may be established entirely by circumstantial evidence. See *$364,960.00 in United States Currency*, 661 F.2d at 324-325. Finally, once the government has made its showing, the burden shifts to the claimant to rebut the inference that the money is related to illicit drug dealing. *Id.* at 325; see 21 U.S.C. 881(d); 19 U.S.C. 1615.

Petitioners in this case do not raise any challenge based on the jury's rejection of their effort to explain the money as the proceeds of emerald sales. Nor do they argue that the court of appeals applied the wrong principles of law. Rather, they contend (Pet. 8-26) simply that the court of appeals reached the wrong result in determining that the government had established probable cause. That contention does not merit further review: the court of appeals' fact-specific ruling is correct and is not in conflict with any decision of this Court or of any other court of appeals.

The court of appeals correctly found that the facts in this case gave rise to more than mere suspicion that the forfeited currency was related to an illegal drug transaction. Campos and Palomino were found with more than $600,000 hidden in corsets on their bodies; they arrived from Miami, a drug-source city, for a four-hour stay in Los Angeles; they gave a suspicious explanation for their trip; after several hours, they had changed clothes and grown much larger in appearance; and they gave false answers to the officers' questions. Moreover, a trained drug-detecting dog indicated that the cash itself had been in the presence of narcotics.[1] These facts, even without

[1] Petitioners entirely disregard the detection dog's alert in their argument that no connection was established between the currency and drug trafficking. In their statement of facts (Pet. 4-8), however, they assert that the dog's alert could not determine when the currency

drugs or paraphernalia having been found in the possession of Campos or Palomino, provided persuasive circumstantial evidence that the money was obtained not just by some unlawful means[2] but in connection with a narcotics transaction. See *United States* v. *$13,000 in United States Currency*, 733 F.2d 581, 583, 585 (8th Cir. 1984); *United States* v. *$55,518.05 in United States Currency*, 728 F.2d 192, 196 (3d Cir. 1984); *United States* v. *$2,500 in United States Currency*, 689 F.2d 10, 16 (2d Cir. 1982), cert. denied, 465 U.S. 1099 (1984).

Contrary to petitioners' suggestion (Pet. 10-21), this fact-dependent finding of probable cause is not in conflict with the Fifth Circuit's finding of no probable cause on different facts in *United States* v. *$38,600.00 in U.S. Currency*, 784 F.2d 694 (1986). There, the forfeiture claimant was found with $38,600 hidden under the back seat of his car, and the car itself smelled of marijuana and contained a small quantity of marijuana and associated paraphernalia. The court of appeals held that those facts, though sufficient to support a strong suspicion and perhaps even probable cause that the money was used in connection with some illegal activity, were insufficient to link the

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had been in contact with narcotics, that the odor might conceivably have originated in the DEA evidence locker where the money had been kept, and that the DEA did not have the money analyzed in a laboratory to confirm the presence of narcotics on it. These observations are irrelevant to petitioners' challenge. In a Section 881(a)(6) forfeiture proceeding, the government must prove only a reasonable ground for belief, or more than mere suspicion, that the money subject to forfeiture was connected to drug trafficking; it need not establish the connection conclusively. See *$364,960.00 in United States Currency*, 661 F.2d at 323. The ultimate soundness of the government's inference regarding the source of the money is an issue for rebuttal.

[2] Indeed, petitioners acknowledge (Pet. 15 (emphasis omitted)) that "the actions of the individuals carrying the currency were certainly suspicious and the officers may have even had probable cause to believe that something illegal was taking place."

money to the exchange of a controlled substance. *Id.* at 698. In this case, the drug-detecting dog's alert, together with the suspicious circumstances surrounding the couriers' brief trip from Miami, showed that the currency hidden on the persons of Campos and Palomino had been in close proximity to illicit drugs. These facts were sufficient to establish the necessary nexus between the possession of the money and the exchange of controlled substances.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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